Supreme Court, U.S.
FILED
DEC 1 1999
OFFICE OF THE CLERK

No. 99-380

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, ET AL., PETITIONERS

v.

HERBERT MARTELL COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Amendment precludes a bankruptcy court from issuing a decision that a debt owed to a State is dischargeable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 173 F.3d 924. The opinion and order of the district court (Pet. App. 22-34) is unreported. The memorandum opinion and order of the bankruptcy court (Pet. App. 35-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1999. A petition for rehearing was denied on June 2, 1999. Pet. App. 48-49. The petition for a writ of certiorari was filed on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Herbert Collins, a former bail bondsman, owed the Commonwealth of Virginia (petitioner) more than $37,000 in unpaid bonds of criminal defendants who had failed to appear in court. In 1990, Collins and his wife (respondents) filed for bankruptcy. Respondents identified the debt to petitioner as an unsecured claim. As is typical in a "no-asset" liquidation case such as this one, petitioner did not file a proof of claim in the bankruptcy case and did not object to discharge. The bankruptcy court issued an order releasing respondents "from all dischargeable debts." Pet. App. 3-4.

Some time after respondents received their discharge in the bankruptcy court, petitioner instituted garnishment proceedings to recover the debt it was owed as a result of the default on the bonds. Respondents then moved the bankruptcy court to reopen their bankruptcy case to consider the dischargeability of the debt owed to petitioner. Pet. App. 4. The motion to reopen the bankruptcy case indicated that, after reopening, respondents planned to bring an adversary proceeding against petitioner to determine the dischargeability of the debt. C.A. App. 42.

A copy of respondents' motion to reopen was served by mail on petitioner, but petitioner was not named as a defendant and was not served with compulsory process. Pet. App. 11. Petitioner filed an objection to the motion to reopen, claiming that the debt was for a "fine, penalty or forfeiture" within the meaning of 11 U.S.C. 523(a)(7) and therefore not dischargeable. After a hearing in which petitioner participated, the bankruptcy court rejected petitioner's argument that the debt was not dischargeable and reopened the bankruptcy case. Pet. App. 35-47. Petitioner appealed the decision to

reopen to the district court, once again arguing that the debt was not dischargeable. The district court agreed with the bankruptcy court that the debt was dischargeable, *id.* at 23-35, and, in light of that holding, it rejected petitioner's contention that the bankruptcy court abused its discretion in reopening the case, *id.* at 33. The district court therefore affirmed the bankruptcy court's order. *Id.* at 4, 23.

2. Petitioner appealed to the court of appeals and argued for the first time that the Eleventh Amendment precluded the relief ordered by the bankruptcy court. In light of petitioner's constitutional challenge to the Bankruptcy Code, the United States intervened in the court of appeals. Pet. App. 4-5.

The court of appeals affirmed. Pet. App. 1-20. The court held that respondents' motion to reopen the case under the Bankruptcy Code was not a suit against a State within the meaning of the Eleventh Amendment. The court explained that "[a]n adversary proceeding, with its compulsory process, is not required to reopen a case"; that petitioner "was not served with process, and was not compelled to appear in bankruptcy court"; and that petitioner "was free to respond to the motion or ignore it." *Id.* at 10-11.

The court of appeals rejected petitioner's contention that the bankruptcy court's determination that the debt was dischargeable transformed the motion to reopen into a suit against a State barred by the Eleventh Amendment. The court noted that petitioner "chose to appear in bankruptcy court and oppose [respondents'] motion to reopen on the ground that the bail bond debt was nondischargeable," and it emphasized that "[a] federal court's jurisdiction over the dischargeability of debt * * * derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over

debtors and their estates." Pet. App. 11 (internal quotation marks omitted). The court therefore concluded that "[t]he Eleventh Amendment was not implicated." *Id.* at 15.

Proceeding to the merits, the court held that a debt for bail bonds is not a "fine," "penalty," or "forfeiture" within the meaning of the Bankruptcy Code. The court therefore concluded that such a debt is dischargeable in bankruptcy. Pet. App. 15-19.

ARGUMENT

Petitioner contends (Pet. 8-24) that the Eleventh Amendment precludes a bankruptcy court from issuing a decision that a debt owed to a State is dischargeable. In the circumstances of this case, that contention is without merit and does not warrant review.*

1. The Eleventh Amendment generally precludes a private party from suing a State in federal court absent its consent. *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As the court of appeals in this case held, however, respondents' motion to reopen their bankruptcy case did not constitute "a suit * * * 'against one of the United States'" within the meaning of the Eleventh Amendment. As the court of appeals explained (Pet. App. 11), although petitioner was served with a copy of respondents' motion, petitioner was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court. Petitioner was "free to respond to the motion or ignore it." *Ibid.* In those circumstances, respondents' motion to reopen

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* Petitioner also contends (Pet. 24-30) that a bail bond debt is not dischargeable. Because the United States intervened in the court of appeals solely to address petitioner's Eleventh Amendment argument, we take no position on the question whether a bail bond debt is dischargeable.

had none of the characteristics of a suit against a State, and the Eleventh Amendment therefore was not implicated. See *Seminole Tribe*, 517 U.S. at 58 (Eleventh Amendment exists in order to prevent federal-court judgments that must be paid out of a State's treasury and to avoid subjecting a State to the coercive process of judicial tribunals at the instance of private parties).

Petitioner does not contend that respondents' motion to reopen was itself a suit against a State within the meaning of the Eleventh Amendment. Instead, petitioner argues that the motion was transformed into a suit against a State when the bankruptcy court issued a decision that the debt respondents owed to petitioner was dischargeable under the Bankruptcy Code. That contention ignores the unusual circumstances that led the bankruptcy court to make a decision on the dischargeability of the debt in this case.

Respondents' motion to reopen did not request an immediate determination on the dischargeability of the debt. Instead, respondents' motion contemplated that, once the case was reopened, they would file an adversary action to obtain such a determination. See C.A. App. 42. Accordingly, when respondents filed their motion to reopen, petitioner could have ignored the motion, awaited the filing of an adversary action, and asserted sovereign immunity as a defense to such an action. Alternatively, petitioner could have sought to enter a special appearance to oppose the motion to reopen on the ground that reopening would be futile because an adversary action would be barred by sovereign immunity. Petitioner, however, pursued neither of those alternatives. Instead, petitioner "chose to appear in bankruptcy court and oppose [respondents'] motion to reopen on the ground that the bail bond debt was nondischargeable." Pet. App. 11. Having invited the

bankruptcy court to make a decision on the dischargeability of the debt in the context of respondents' motion to reopen, petitioner is in no position now to complain that the Eleventh Amendment precluded the bankruptcy court from accepting that invitation.

This Court's decision in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), is instructive. There, New Jersey filed a proof of claim in bankruptcy court, but when the trustee filed a petition objecting to the claim, New Jersey argued that entertainment of the petition by the bankruptcy court would constitute a prohibited suit against a State. The Court squarely rejected that contention. The Court held that "[i]t is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure," and that "[i]f the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim." *Id.* at 573-574.

In *In re Platter*, 140 F.3d 676 (1998), the Seventh Circuit applied that same principle in the context of a bankruptcy court's dischargeability determination. There, a state agency filed an adversary action against a debtor in bankruptcy court, contending that a debt owed to the state agency was not dischargeable. After the bankruptcy court held the debt dischargeable, the state agency argued that the Eleventh Amendment precluded the bankruptcy court from making that determination. The Seventh Circuit rejected that argument, explaining that "[t]he Eleventh Amendment does not prevent a state from entering a federal forum voluntarily to pursue its own interest. However, if a state embarks down this route, it cannot run back to

seek Eleventh Amendment protection when it does not like the result." 140 F.3d at 680 (citation omitted).

The decision below is consistent with the decisions in *Gardner* and *In re Platter*. Petitioner had no obligation to respond to respondents' motion to reopen the case. Having chosen to file an objection to the motion to reopen on the express ground that the debt was not dischargeable, petitioner cannot escape the consequences of its actions by taking refuge in the Eleventh Amendment. The court below correctly rejected petitioner's effort to transform the Eleventh Amendment from a shield against unconsented suit into a means of escaping the effect of an invited decision on the merits.

2. Review is unwarranted in this case for the additional reason that the issue presented is quite narrow and is unlikely to recur in the future. The decision in this case is a product of petitioner's decision to challenge a motion to reopen on the ground that the debt was not dischargeable. In future cases, States that desire to avoid a bankruptcy court determination on dischargeability are unlikely to expressly invite one. Instead, States that want to avoid such a determination will either ignore the motion to reopen and await an adversary proceeding, at which time they can raise a defense of sovereign immunity, or oppose the motion to reopen on the ground that reopening would be futile because they will assert sovereign immunity in response to any adversary proceeding.

The issues that are likely to arise in that context are quite different from the question presented here. Those issues include (1) whether a bankruptcy court would have authority under the Bankruptcy Code to make a decision on dischargeability in the context of a motion to reopen, rather than in an adversary proceeding, when the State has not invited such a

determination; (2) whether a debtor could obtain a determination that a debt owed to a State is dischargeable by filing an action under *Ex parte Young*, 209 U.S. 123 (1908), against the state official who is attempting to collect the debt; and (3) whether a debtor could obtain a dischargeability determination by filing an adversary action against the State under 11 U.S.C. 106(a). The third question would implicate the constitutionality of Section 106(a), which expressly authorizes a debtor to file an adversary action against a State in bankruptcy court. Because petitioner invited the bankruptcy court to make a determination on dischargeability prior to the initiation of an adversary proceeding, however, none of those questions is presented here.

3. Finally, petitioner does not even allege that there is a conflict in the circuits on the question presented in this case. The absence of such a conflict further counsels against review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1999